

No. 11,921

United States  
Circuit Court of Appeals

For the Ninth Circuit

EUGENE V. HENSLEY, JAMES W. HENSLEY,  
UNITED SALES COMPANY, a corporation,  
and UNITED DISTRIBUTORS, INC., a cor-  
poration,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court  
for the District of Arizona

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PAUL P. O'BRIEN,

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## Subject Index

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	Pages
Statement of the Pleadings and Facts.....	1
Jurisdiction of the District Court.....	8
Jurisdiction of This Court.....	8
Statement of the Case.....	10
Questions Involved .....	11
How Questions Are Raised.....	13
Specification of Errors.....	14
Argument .....	17
(a) Title 26 U.S.C.A. Section 2857 does not require that a wholesale liquor dealer keep a record for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, or to make an entry in such record of such name and address, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.....	17
(b) Title 26 U.S.C.A. Section 2857 does not constitutionally empower or constitutionally delegate power to the Commissioner of Internal Revenue, alone or with the approval of the Secretary, to promulgate a regulation requiring the use of a form, or prescribe a form, wherein wholesale liquor dealers must by an entry indicate the name and address of the person or persons to whom distilled spirits were sent, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses, does not	

state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.....	25
(c) The regulations promulgated by the Commissioner of Internal Revenue, Sections 194.75 to 194.81 inclusive of Title 26, Code of Federal Regulations pursuant to Title 26 U.S.C.A. Section 2857, do not require that a wholesale liquor dealer make an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses, does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction .....	34
(d) That portion of Title 26 U.S.C.A. Section 2857 upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt .....	43
(e) That portion of the regulations of the Commissioner, Sections 194.75 to 194.81 inclusive of Title 26 Code of Federal Regulations, upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.....	45
Conclusion .....	47

## APPENDIX

A. The Present Statute, 26 Code U.S.C. Sec. 2857.....	1
B. The Statute Prior to Amendment in 1936, Rev. Stat. 3318, U.S.C. 1934 ed., Title 26 Sections 1208 and 1209.....	3

SUBJECT INDEX

iii

Pages

C. The Statute as Amended in 1936, Act of June 26, 1936, Chapter 830, Title IV, Section 411, 49 Stat. 1962-1963.....	5
D. The Original Statute, Act of July 20, 1868, Chapter 186, Section 45, 15 Stat. 143.....	7
E. The Regulations: Sections 194.75 to 194.81 inclusive, Title 26, Code of Federal Regulations.....	9

## Table of Authorities Cited

	Page
CASES	
Campbell v. Galeno Chemical Co., 281 U.S. 599; 50 S.Ct. 412; 74 L.Ed. 1063.....	28
Connally, Commissioner, et al., v. General Const. Co., 269 U.S. 385; 46 S.Ct. 126; 70 L.Ed. 322.....	45, 46
Connolly v. U. S. (C.C.A. 9th) 149 F.(2d) 666, 669.....	22
Fasulo v. U. S., 272 U.S. 620; 47 S.Ct. 200; 71 L.Ed. 443.....	25
Harrison v. Vose, 9 Howard 372, 378; 50 U.S. 372, 378; 13 L.Ed. 179, 182.....	23, 47
Kobilkin v. Pillsbury, et al., (C.C.A. 9th) 103 F.(2d) 667, 670 .....	28
Koshland v Helvering, 298 U.S. 441, 447; 56 S.Ct. 767, 770; 80 L.Ed. 1268, 1273.....	28
Lynch v. Tilden Produce Co., 265 U.S. 315; 44 S.Ct. 488; 68 L.Ed. 1034.....	34, 43
McBoyle v. U. S., 283 U.S. 25, 27; 51 S.Ct. 340, 341; 75 L.Ed. 816, 818.....	19
Merritt v. Welsh, 104 U.S. 694; 26 L.Ed. 896.....	30
M. Kraus & Bros. v. U. S., 327 U.S. 614; 66 S.Ct. 705; 90 L.Ed. 894.....	34, 43
Morrill, Collector, etc., v. Jones, 106 U.S. 466, 1 S.Ct. 423; 27 L.Ed. 267.....	31
Pierce v. U. S., 314 U.S. 306, 311; 62 S.Ct. 237, 240; 86 L.Ed. 226, 231.....	23
Peoria & P.U.R. Co. v. U.S., 263 U.S. 528, 534-535; 44 S.Ct. 194, 196; 68 L.Ed. 427, 430.....	28
Riverdale Co-Operative Creamery Assn. v. Commissioner of Internal Revenue, (C.A.A. 9th) 48 F.(2d) 711, 714.....	28
Todd v. U. S., 158 U.S. 278, 282; 15 S.Ct. 889, 890; 39 L.Ed. 982.....	24, 42

TABLE OF AUTHORITIES CITED

v

Page

U. S. v. Bathgate, 246 U.S. 220; 38 S.Ct. 269; 62 L.Ed. 676	25
U. S. v. Bhagat Singh Thind, 261 U.S. 204, 209; 43 S.Ct. 338, 340; 67 L.Ed. 616, 617.....	19
U. S. v. Eaton, 144 U.S. 677; 12 S.Ct. 764; 36 L.Ed. 591.....	29, 42
U. S. v. Fruit Growers' Express Co., 279 U.S. 363, 370; 49 S.Ct. 374, 377; 73 L.Ed. 739, 743.....	28
U. S. v. George, 228 U.S. 14; 33 S.Ct. 412; 57 L.Ed. 712.....	34, 43
U. S. v. Harris, 177 U.S. 305; 20 S.Ct. 609; 44 L.Ed. 780.....	42
U. S. v. Lamson, 162 Fed. 165, 168.....	36
U. S. v. Lamson (1908), 165 Fed. 80, 81.....	39
U. S. v. L. Cohen Grocery Co., 255 U.S. 81; 41 S.Ct. 298; 65 L.Ed. 516.....	45, 46
U. S. v. Noveck, 271 U.S. 201, 204; 46 S.Ct. 476, 477; 70 L.Ed. 904, 906.....	24
U. S. v. One Ice Box, 37 F.(2d) 120, 123.....	22
U. S. v. Resnick, 299 U.S. 207, 209; 57 S.Ct. 126, 127; 81 L.Ed. 127, 129.....	25, 43
U. S. v. Standard Brewery, 251 U.S. 210, 220; 40 S.Ct. 139, 141; 64 L.Ed. 229, 235.....	43
U. S. v. United Verde Copper Co., 196 U.S. 207, 215; 25 S.Ct. 222, 225; 49 L.Ed. 449, 452.....	34, 43
U. S. v. Weitzel, 246 U.S. 533, 543; 38 S.Ct. 381, 383; 62 L.Ed. 872, 875.....	24
U. S. v. Wiltberger, 5 Wheat. 76, 95; 18 U.S. 76, 95; 5 L.Ed. 37.....	24, 42
Viereck v. U. S., 318 U.S. 236; 63 S.Ct. 561, 562; 87 L.Ed. 734.....	40
Waite v. Macy, 246 U.S. 606, 608-609; 38 S.Ct. 395, 396; 62 L.Ed. 892, 894.....	30
Williamson v. U. S., 207 U.S. 425; 28 S.Ct. 163; 52 L.Ed. 278.....	30, 47

## TABLE OF AUTHORITIES CITED

## STATUTES

Act of June 20, 1868, Sec. 45, 15 Stat. 143.....	20
Act of February 27, 1877, Chapter 69, Sec. 1, 19 Stat. 248..	20
Act of March 1, 1879, Chapter 125, Sec. 2, 20 Stat. 329.....	20
Act of August 2, 1886, Sec. 5, 24 Stat. 210; Title 26 U.S.C.A., Section 2302(c).....	38
Act of 1897, Chapter 2, 30 Stat. 36.....	26
Act of August 2, 1902, Sec. 6, 32 Stat. 197; Title 26 U.S.C.A., Sec. 2303(c).....	38
Act of June 26, 1936, Chapter 830, Title IV, Sec. 411, 49 Stat. 1962 .....	21
Revised Statutes, Sec. 3318.....	20, 21, 37
Revised Statutes, Sec. 5388.....	26
Title 18 U.S.C.A., Sec. 88.....	3, 8
Title 18, U.S.C.A., Sec. 546.....	8
Title 18, U.S.C.A., Sec. 3231.....	8
Title 26 U.S.C.A., Sec. 2857.....	Cited Throughout Brief
Title 28 U.S.C.A., Sec. 41.....	8
Title 28 U.S.C.A., Sec. 225.....	8
Title 28 U.S.C.A., Sec. 371.....	8
Title 28, U.S.C.A., Sec. 1291.....	8
Title 50, U.S.C.A., War Appendix Sections 921, 922, 925.....	27

## RULES AND REGULATIONS

Code of Federal Regulations, Title 26, Sections 194.75 to 194.81 inclusive .....	9, 10, 12, 34, 45
Code of Federal Regulations, Title 26, Section 310.24.....	38
Code of Federal Regulations, Title 26, Section 310.42.....	38
Federal Rules of Criminal Procedure, Rule 37(a) (2).....	9



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*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

**BRIEF FOR APPELLANTS**

Upon Appeal from the United States District Court  
for the District of Arizona

**STATEMENT OF THE PLEADINGS AND FACTS**

This is an appeal by each of the appellants, defendants below, from a judgment of conviction, rendered against each upon the verdict of a jury in the United States District Court for the District of Arizona after a trial before Honorable Dave W. Ling, District Judge, and a jury, and entered against each appellant on May 3, 1948 (142-148).\*

\*Where figures only appear in parentheses in this Brief, they refer to page numbers of the printed Transcript of Record.

This appeal challenges the indictment upon which appellants were convicted, and the appellants contend that each count of the indictment fails to state facts sufficient to constitute an offense against the United States and therefore fails to support the judgments of conviction appealed from.

The indictment, filed November 6, 1947, contained 69 counts (2, 59).

Counts 1 to 68, inclusive, of the indictment are identical except as to the description of the then wholesale liquor dealer, the place of business, the names of the accused, the date of the offense, and the name and address on Form 52-B of the person or persons to whom distilled spirits were sent. These counts charged that certain of the defendants then being wholesale liquor dealers, as such were required to keep a record of distilled spirits disposed of by them on a form prescribed by the Commissioner, to wit, Form 52-B, to be used for the purpose of indicating among other things the name and address of the person or persons to whom distilled spirits were sent. These counts charged that in violation of Title 26 U.S.C.A. Section 2857, certain of the defendants, among which were certain of the defendants-appellants and defendant James O. Cox, as wholesale liquor dealers, on particular days, did make false entries in Form 52-B, record of distilled spirits disposed of, as to the name and address of person or persons to whom distilled spirits were sent (2).

Count 69 of the indictment charged that the defendants, namely the defendants-appellants and defendant James O. Cox, as wholesale liquor dealers, were required to keep

a record of distilled spirits disposed of by them on a form prescribed by the Commissioner, to wit, Form 52-B, to be used for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, and that in April, 1945, and continuing until January 31, 1947, the defendants in violation of Title 18 U.S.C.A. Section 88, entered into a conspiracy to violate Title 26 U.S.C.A. Section 2857, the object of which was to make false entries in Forms 52-B regarding defendant's disposal of distilled spirits as a wholesale liquor dealer, with the intent and design to hide and conceal from the United States the names and addresses of the person or persons to whom distilled spirits were sent, and the prices obtained from the sale thereof, and in furtherance of said conspiracy and to effect the object thereof, committed certain overt acts (57).

All the defendants were placed on trial upon said indictment (62). Certain of the counts were dismissed upon motion of the Government at the close of the Government's case (96), and on March 25, 1948, the jury returned its verdict upon the remaining counts (99-108) and thereby defendant James O. Cox was acquitted on all counts in which he was a defendant (101), and the other defendants, appellants here, were acquitted on certain counts and convicted on other counts. Because of the multiplicity of counts accusing different defendants at different times, and the various dispositions made of these counts, for convenience and clarity there next follows a schedule which summarizes the condition of the record in these respects:

Counts	Date of Offense and Entry	Defendants Charged	Disposition of Counts	Defendants Convicted
I 1	Apr. 14, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
II 2	Apr. 14, '45	Eugene V. Hensley James O. Cox	Acquitted	
III 3	Apr. 28, '45	Eugene V. Hensley James O. Cox	Acquitted	
IV 4	Apr. 28, '45	Eugene V. Hensley James O. Cox	Acquitted	
V 5	May 5, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
VI 6	May 18, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
VII 7	May 18, '45	Eugene V. Hensley James O. Cox	Acquitted	
VIII 8	May 22, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
IX 9	May 22, '45	Eugene V. Hensley James O. Cox	Acquitted	
X 10	June 4, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
XI 11	June 4, '45	Eugene V. Hensley James O. Cox	Acquitted	
XII 12	June 4, '45	Eugene V. Hensley James O. Cox	Acquitted	
XIII 13	July 6, '45	Eugene V. Hensley James O. Cox	Acquitted	
XIV 14	July 6, '45	Eugene V. Hensley James O. Cox	Dismissed	
XV 15	July 10, '45	Eugene V. Hensley James O. Cox	Acquitted	
XVI 16	Aug. 30, '45	Eugene V. Hensley James O. Cox	Dismissed	
XVII 17	Aug. 30, '45	Eugene V. Hensley James O. Cox	Acquitted	
XVIII 18	Sept. 20, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
XIX 19	Sept. 29, '45	Eugene V. Hensley James O. Cox	Acquitted	
XX 20	Oct. 11, '45	Eugene V. Hensley James O. Cox	Dismissed	
XXI 21	Oct. 11, '45	Eugene V. Hensley James O. Cox	Dismissed	
XXII 22	Oct. 11, '45	Eugene V. Hensley James O. Cox	Acquitted	
XXIII 23	July 2, '46	Eugene V. Hensley	Acquitted	
XXIV 24	July 13, '46	Eugene V. Hensley	Dismissed	

Counts	Date of Offense and Entry	Defendants Charged	Disposition of Counts	Defendants Convicted
XXV 25	July 16, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXVI 26	Aug. 2, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXVII 27	Aug. 12, '46	Eugene V. Hensley	Acquitted	
XXVIII 28	Aug. 13, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXIX 29	Sept. 4, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXX 30	Sept. 4, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXXI 31	Dec. 6, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensley
XXXII 32	Dec. 6, '45	Eugene V. Hensley James O. Cox	Acquitted	
XXXIII 33	Dec. 6, '45	Eugene V. Hensley James O. Cox	Acquitted	
XXXIV 34	Jan. 14, '46	Eugene V. Hensley	Dismissed	
XXXV 35	Jan. 18, '46	Eugene V. Hensley	Acquitted	
XXXVI 36	Feb. 20, '46	Eugene V. Hensley	Acquitted	
XXXVII 37	Feb. 20, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXXVIII 38	Feb. 20, '46	Eugene V. Hensley	Acquitted	
XXXIX 39	Mar. 7, '46	Eugene V. Hensley	Acquitted	
L 40	Mar. 14, '46	Eugene V. Hensley	Dismissed	
LI 41	Mar. 16, '46	Eugene V. Hensley	Dismissed	
LII 42	Apr. 11, '46	Eugene V. Hensley	Acquitted	
LIII 43	Apr. 12, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
LIV 44	May 20, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
LV 45	June 28, '46	Eugene V. Hensley	Dismissed	
LVI 46	July 22, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
LVII 47	Aug. 29, '46	Eugene V. Hensley	Acquitted	
LVIII 48	Sept. 24, '46	Eugene V. Hensley	Acquitted	
LIX 49	Oct. 1, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
50	Oct. 1, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
I 51	Oct. 14, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
II 52	Oct. 15, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Dismissed	
III 53	Nov. 18, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley
IV 54	Nov. 18, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Dismissed	
V 55	Nov. 29, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley

Counts	Date of Offense and Entry	Defendants Charged	Disposition of Counts	Defendants Convicted
LVI 56	Dec. 3, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
LVII 57	Dec. 23, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley
LVIII 58	Dec. 26, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
LIX 59	Jan. 6, '47	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley
LX 60	Jan. 20, '47	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
LXI 61	Jan. 27, '47	United Sales Co. Eugene V. Hensley James W. Hensley	Dismissed	
LXII 62	Oct. 7, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Conviction	United Distrs., Inc. Eugene V. Hensley James W. Hensley
LXIII 63	Oct. 28, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Acquitted	
LXIV 64	Nov. 25, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Acquitted	
LXV 65	Dec. 16, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Conviction	United Distrs., Inc. Eugene V. Hensley James W. Hensley
LXVI 66	Dec. 23, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Conviction	United Distrs., Inc. Eugene V. Hensley James W. Hensley
LXVII 67	Jan. 21, '47	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Dismissed	
LXVIII 68	Jan. 30, '47	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Dismissed	
LXIX 69	(Conspiracy)	Eugene V. Hensley James O. Cox James W. Hensley United Sales Co. United Distrs., Inc.	Conviction	Eugene V. Hensley James W. Hensley United Sales Co. United Distrs., Inc.

Each of the appellants timely moved in arrest of judgment (112-115). These motions were denied on May 3, 1948 (141-142), and appellants were, on that day, sentenced by the District Court respectively upon the counts on which each had been convicted as follows:

Eugene V. Hensley—Imprisonment for a period of one year and a fine of \$2,000.00 on each count, sentences to run concurrently (142-143).

James W. Hensley—Imprisonment for a period of six months and paying fine of \$2,000.00 on each count, sentences to run concurrently (144-145).

United Sales Company, a corporation—Paying a fine of \$2,000.00 on each count, sentences to run concurrently (145-146).

United Distributors, Inc., a corporation—Paying a fine of \$2,000.00 on each count, sentences to run concurrently (146-147).

Each of the appellants immediately filed their respective notice of appeal in duplicate with the Clerk of the United States District Court (155-158), serving a copy thereof upon the United States Attorney, and the individual appellants each gave notice that they did not elect to commence service of the sentence pending appeal (148-154). Each of the individual appellants immediately made application to the District Court for admission to bail and for a stay of execution of sentence and of all proceedings for the collection of fines imposed, during dependency of appeal (147-148). The corporate appellants each immediately made application for a stay of execution of sentence and of all proceedings for the collection of fines imposed, during the dependency of appeal (147-148). The District Court denied these applications, gave as the rea-

son that there was no substantial question involved in the appeal (148). The individual appellants were remanded to the custody of the United States Marshal and held in confinement in the Maricopa County jail on May 3, 1948 (142-144).

Each of the appellants then promptly made application to the Circuit Court of Appeals for the Ninth Circuit for the relief asked the District Court pending appeal, and said Circuit Court granted the relief applied for (159-161), the order of said Circuit Court being received by the Court below on May 17, 1948 (161). Each of the appellants on that day complied with the conditions of the relief granted them pending appeal (162).

#### **Jurisdiction of the District Court**

The District Court had jurisdiction of this case because it was a criminal case instituted by a Grand Jury Indictment (2) in the United States District Court for the District of Arizona, which charged the appellants with violations of Title 26 U.S.C.A. Section 2857, and Title 18 U.S.C.A. Section 88 and is cognizable only by the United States Courts, which have exclusive jurisdiction over crimes and offenses cognizable under the authority of the United States. Jurisdiction of the District Court was invoked under the following statutes: Title 18 U.S.C. A. Section 546, Title 28 U.S.C.A. Section 41, and Title 28 U.S.C.A. Section 371, now embodied in Title 18 U.S.C.A. Section 3231.

#### **Jurisdiction of This Court**

Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C.A. Section 1291, previously Section 225.



The order of the District Court overruling the timely Motion in Arrest of Judgment made by each appellant, and the Judgment of Conviction appealed from were entered, and sentences thereon were imposed on May 3, 1948 (141-147), Notice of Appeal of each appellant was filed on May 3, 1948 (148-154). Consequently, the appeal was duly and timely taken within the time and in the manner provided by Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

This appeal raises the question of the validity of the statute invoked, i.e., Title 26 U.S.C.A. Section 2857, which statute is set out in full in Appendix A to this Brief. The pertinent provisions of this statute are as follows:

“\* \* \* every wholesale liquor dealer \* \* \* shall keep daily \* \* \* a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: \* \* \* The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

“Every \* \* \* wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, \* \* \* or makes any false entry therein \* \* \* shall pay a penalty of \$100 and, on conviction, shall be fined not less than \$100 nor more than \$5,000, and be imprisoned not less than three months nor more than three years.”

This appeal raises the question of the validity of regulations promulgated pursuant to that statute and upon which the indictment is predicated, i.e., Sections 194.75

to 194.81 inclusive, of Title 26, Code of Federal Regulations (118-120, 137) (pages 3001 to 3003, Supplement 1940, Book 2, Titles 21 to 29 of the Code of Federal Regulations), which regulations are set out in full in Appendix E to this Brief. The pertinent provisions of these regulations are as follows:

“194.75 Records to be kept by wholesale liquor dealers. (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, ‘Wholesale Liquor Dealer’s Record,’ and render monthly transcripts, Forms 52A and 52B, ‘Wholesale Liquor Dealer’s Monthly Report,’ and Form 338, ‘Wholesale Liquor Dealer’s Monthly Report (Summary of Forms 52A and 52B).’

“(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon  
\* \* \* .”

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### STATEMENT OF THE CASE

Appellants were convicted upon certain counts of a 69 count indictment returned against them, and appeal from the respective judgments of conviction entered thereon. Each of the counts for its validity depends upon Title 26 U.S.C.A. Section 2857 and the regulations promulgated pursuant thereto, namely, Sections 194.75 to 194.81 inclusive, of Title 26, Code of Federal Regulations, which are set out verbatim in the Appendix to this Brief, the statute in Appendix A and the regulations in Appendix E.

**Questions Involved**

Appellants, and each of them, contend that each count of the indictment fails to charge an offense against the United States, and, therefore, fails to support the judgment of conviction appealed from for the following reasons:

1. The indictment fails to charge the commission of a crime.

2. Title 26 U.S.C.A. Section 2857 does not require that a wholesale liquor dealer keep a record for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, or to make an entry in such record of such name and address, therefore, the statute does not support a conviction upon the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses.

3. Title 26 U.S.C.A. Section 2857 does not constitutionally empower or constitutionally delegate power to the Commissioner of Internal Revenue alone, or with the approval of the Secretary, to promulgate a regulation requiring the use of a form, or prescribe a form, wherein wholesale liquor dealers must by an entry indicate the name and address of the person or persons to whom distilled spirits were sent, therefore, the statute does not support a conviction upon the indictment charging the making of false entries in such record as to the names and

addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses.

4. The regulations promulgated by the Commissioner of Internal Revenue, Sections 194.75 to 194.81 inclusive, of Title 26, Code of Federal Regulations, pursuant to Title 26 U.S.C.A. Section 2857, do not require that a wholesale liquor dealer make an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, therefore, the statute does not support a conviction upon the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses.

5. That portion of Title 26 U.S.C.A. Section 2857 upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

6. That portion of the regulations of the Commissioner, Sections 194.75 to 194.81 inclusive, of Title 26 Code of Federal Regulations, upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

### How Questions Are Raised

The issues of law raised in this appeal are raised by several motions and objections made by each of the appellants as follows:

By a motion to dismiss the indictment made at the close of the opening statement of the United States Attorney when the trial began, which motion asserted that the indictment failed to state a public offense (63-64, 117), which motion was renewed at the close of the prosecution's case (94-96, 133-138) and at the close of the whole case (96-97, 138), all of which motions were denied by the District Court.

By an objection and continuing objection to the indictment and to the introduction in evidence of Form 52-B, which objection asserted in substance that the indictment failed to state a public offense and challenged the validity of the regulations promulgated under Title 26 U.S.C.A. Section 2857, the statute invoked, concerning Form 52-B to have the effect of creating or constituting a crime by reason of a false entry therein as to the name and address of the person or persons to whom distilled spirits were sent (66-67, 121-132), which objections were renewed at the close of the prosecution's case (94-96, 133-138) and at the close of the whole case (97, 138), all of which objections were overruled by the District Court.

By a motion at the close of the prosecution's case to strike each and every Form 52-B in evidence, which motion asserted in substance the same grounds as those for the above mentioned objection to the indictment and to the introduction in evidence of Forms

52-B (94-96, 133-135), which motion was renewed at the close of the whole case (97, 138), all of which motions were denied by the District Court.

By a motion for judgment of acquittal on each and every count made at the close of the prosecution's case, which motion asserted in substance the same grounds as those for the above mentioned objection to the indictment and to the introduction in evidence of Forms 52-B (94-95, 135-137), which motion was renewed at the close of the whole case (97, 138), all of which motions were denied by the District Court.

By a motion in arrest of judgment on each and every count on which convicted, which motion asserted that none of the counts of the indictment upon which the jury returned a verdict of guilty stated facts sufficient to constitute an offense against the United States, and none stated an offense against the United States (112-115, 141-142), which motion was denied by the District Court.

By these motions and objections, the following question was raised which is involved on this appeal: Does the indictment, or any count thereof, state facts sufficient to constitute an offense against the United States?

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## **SPECIFICATION OF ERRORS**

### **I.**

The Court erred in denying defendants-appellants' motion to dismiss the indictment made at the close of the opening statement of the United States Attorney when

the trial began, renewed and denied at the close of the prosecution's case, renewed and denied at the close of the whole case, which motion asserted that the indictment failed to state a public offense, because no count of the indictment states facts sufficient to constitute an offense against the United States.

## II.

The Court erred in overruling defendants-appellants' objection and continuing objection to the indictment and to the introduction into evidence of Form 52-B, renewed and denied at the close of the prosecution's case, and renewed and denied at the close of the whole case, which objection asserted that the indictment failed to state a public offense, and that the statute, Title 26 U.S.C.A. 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, because no count of the indictment states facts sufficient to constitute an offense against the United States and the statute, 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent.

## III.

The Court erred in denying defendants-appellants' motion to strike each and every Form 52-B, made and renewed at the close of the prosecution's case, and renewed and denied at the close of the whole case, which objec-

tion asserted that the indictment failed to state a public offense, and that the statute Title 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, because no count of the indictment states facts sufficient to constitute an offense against the United States and the statute 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent.

#### IV.

The Court erred in denying defendants-appellants' motion for judgment of acquittal on each and every count of the indictment, made at the close of the prosecution's case, and renewed and denied at the close of the whole case, which objection asserted that the indictment failed to state a public offense, and that the statute, Title 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, because no count of the indictment states facts sufficient to constitute an offense against the United States and the statute, 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent.



The Court erred in denying defendants-appellants' respective motions in arrest of judgment on each and every count on which convicted, which motions asserted that none of the counts of the indictment upon which the jury returned a verdict of guilty stated facts sufficient to constitute an offense against the United States, and none stated an offense against the United States, because no count of the indictment states facts sufficient to constitute an offense against the United States, and none did state an offense against the United States.

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### ARGUMENT

**(a) Title 26 U.S.C.A. Section 2857 does not require that a wholesale liquor dealer keep a record for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, or to make an entry in such record of such name and address, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.**

(Specification of Errors I, II, III, IV, V)

The pertinent parts of Title 26 U.S.C.A. Section 2857, the whole of which is set out in Appendix A, are as follows:

“\* \* \* every wholesale liquor dealer \* \* \* shall keep daily \* \* \* a record of distilled spirits received and

disposed of by him, and shall render under oath correct transcripts and summaries of such records. \* \* \* The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. Every \* \* \* wholesale liquor dealer who refuses or neglects to keep such records in the form-prescribed by the Commissioner, with the approval of the Secretary, \* \* \* or makes any false entry therein \* \* \* shall pay a penalty of \$100 and, on conviction shall be fined not less than \$100 nor more than \$5,000, and be imprisoned not less than three months nor more than three years.”

The “record” required by the statute is “a record of distilled spirits received and disposed of.” Nowhere in the statute is it required that there be recorded “the name and address of the person or persons to whom distilled spirits were sent,” or requiring that an entry of such name and address be made in that “record.” The statute does not denounce as an offense the making of a false entry as to the name and address of the person to whom distilled spirits were sent.

That a record be kept, and entries made therein setting forth the name and address of the person to whom distilled spirits were sent, is a command neither within the express terms of the statute nor encompassed within the ordinary meaning of the words employed by the command of the statute, because the phrase “record of distilled spirits received and disposed of by him” does not convey or connote the idea that this “record” must also contain an entry indicating “the name and address of the person or persons to whom distilled spirits were sent.”

The words of the statute are ordinary words of common speech and "are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken." *U. S. v. Bhagat Singh Thind*, 261 U.S. 204, 209; 43 S.Ct. 338, 340; 67 L.Ed. 616, 617; *McBoyle v. U. S.*, 283 U.S. 25, 27; 51 S.Ct. 340, 341; 75 L.Ed. 816, 818. The "record" required is "a record of distilled spirits," having but two entries, one, "distilled spirits received," and the other, "distilled spirits \* \* \* disposed of." There is nothing in the meaning of the words used even faintly suggesting that "a record" is, as the indictment contends, "for the purpose of indicating, among other things, the name and address of the person or persons to whom distilled spirits were sent."

Were the Government to command wholesale milk dealers: "Keep a daily record of milk received and disposed of," every milk dealer would write: Milk received Tuesday—100 gallons; Milk disposed of Tuesday—100 gallons. No dealer would suppose that by such a command he was required to write: Milk disposed of Tuesday—10 gallons sent to John Jones, 275 Central Ave., Phoenix, Ariz.; 10 gallons sent to Tom Smith, corner Cave Creek Road and E. Dunlap, Sunnyslope, Phoenix, Arizona, etc.

The statute in juxtaposition employs the terms "received" and "disposed of" as terms of direct opposite meanings, or more accurately as precise antonyms. In the proviso clause of the statute, the phrase "sent out" is used as a synonym for "disposed of" and employed as an antonym for "received." There is nothing in the current meaning of the terms "daily," "record of distilled spirits," "received," and "disposed of" or "sent out," or in their etymology, which supports any meaning other

than that a wholesale liquor dealer shall sum up in writing each day the quantity of the spirits received, and the quantity disposed of. *The command of the statute is to keep a daily record of what was received and what was disposed of, not from whom it was received and to whom it was sent.*

Congress did not write such a command into the statute. To the contrary, having before it in the statute just such a command, Congress in 1936 specifically struck it out, which makes crystal clear the fact that the statute in question does not require the making of an entry "indicating the name and address of the person or persons to whom distilled spirits were sent."

The original statute (set out in full in Appendix D of this Brief) was enacted by the Act of June 20, 1868, Section 45, 15 Stat. 143, ultimately becoming Section 3318 of the Revised Statutes.\* Rev. Stat. 3318 as it was prior to the 1936 amendment is set forth in full in Appendix B. Prior to the 1936 amendment, Rev. Stat. 3318 required that every wholesale liquor dealer "shall provide a book to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue" and "enter in such book, and in the proper columns respectively prepared for the purpose \* \* \* the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and frac-

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\*Amendments to the original 1868 Act are unimportant and not material to the issue at bar. By the Act of February 27, 1877, Chapter 69, Section 1, 19 Stat. 248, two minor corrections were made. By the Act of March 1, 1879, Chapter 125, Section 2, 20 Stat. 329, the details of the monthly transcript and the procedure for forwarding the same to the collector were added.

tions of a gallon at proof, and, if in the original packages in which they were received, the name of the distiller and the serial number of the package." But by the Act of June 26, 1936, Chapter 830, Title IV, Section 411, 49 Stat. 1962 (set forth in full in Appendix C), these requirements were specifically deleted and eliminated by Congress, and the pertinent statutory requirements became, as they now are in 26 U.S.C.A. 2857, viz., "every \* \* \* wholesale liquor dealer shall keep daily, at his place of business, a record of distilled spirits received and disposed of by him." The decisive effect of the 1936 amendment is clearly shown when the entries required by Rev. Stat. 3318 before the 1936 amendment are compared to those specified by Rev. Stat. 3318 as amended in 1936, viz.:

Columnar Entries Specified by R.S. 3318 Prior to 1936 Amendment	Entries Specified by R.S. 3318 Subsequent to 1936 Amendment, and as Continued in Title 26 U.S.C.A. Section 2857
"the day when"	"daily"
"the name and place of business of the person or firm to whom such spirits are to be sent"	
"if in the original pack- ages in which they were received, the name of the distiller"	
"the quantity * * * of such spirits"	"distilled spirits * * * disposed of"
"kind or quality of such spirits"	
"the number of gallons and fractions of a gallon at proof"	
"if in the original pack- ages in which they were received * * * the serial number of the package"	

It is the rule that where the legislative body, in amending an act, omits requirements expressed in the original act in simple language, plain in its meaning, the presumption of law is that the requirements no longer exist, at least in the absence of express words showing that the requirements were intended to continue. "Neither ambiguous nor uncertain language will prevail against such an express omission." *U. S. v. One Ice Box* (D.C. Ill.) 37 Fed. 2d 120, 123, citing cases.

We are here dealing with a highly penal statute, which, as few federal criminal statutes do, imposes mandatory punishment if its terms are disobeyed. Such a statute is to be strictly construed. *Connolly v. U. S.* (C.C.A. 9) 149 Fed. 2d 666, 669. So far as the statute is concerned, by the 1936 amendment both the requirement of making an entry, and the offense of making a false entry, as to the name and address of the person to whom distilled spirits were sent, were both specifically eliminated and abolished by positive act of the Congress.

It is manifest that 26 U.S.C.A. Section 2857 does not command that an entry be made of the "name and address of the person or persons to whom distilled spirits were sent"; nor does the statute establish as an offense the false making of such an entry. No such words are in the statute; and no words in the statute connote or have any such meaning. Thus, the offenses charged in the indictment are not offenses under the statute upon which they are predicated.

The omission of the statute to specify as offenses, that which the indictment alleges as offenses, cannot be supplied by interpretation, implication or intendment. No

allegation in an indictment can restore to a penal statute that which the Congress has deleted. Nor can the statute be expanded by a pleading or by judicial construction so as to constitute offenses, that which the Congress has not clearly and plainly specified as offenses. "Judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness \* \* \*." When interpreting a criminal statute the court may "not depart from its words and context." *Pierce v. U. S.*, 314 U.S. 306, 311; 62 S.Ct. 237, 240; 86 L.Ed. 226, 231.

To sustain this indictment requires more than interpretation of doubtful terms, a type of interpretation which itself would be contrary to the rule that in the construction of a penal statute all reasonable doubts are to be resolved in favor of the accused in order not "to make every doubtful phrase a dragnet for penalties." *Harrison v. Vose*, 9 Howard 372, 378; 50 U.S. 372, 378; 13 L.Ed. 179, 182. The fact is that to sustain this indictment requires that one or the other of two entirely new and lengthy phrases on a new subject matter be written into the statute. *One*: Unless following the phrase "a record of distilled spirits received and disposed of by him," there be written into the statute the phrase "including the name and address of the person or persons to whom distilled spirits were sent," the statute does not support that which the indictment charges are offenses. *Two*: If not that, then following the phrase "such records in the form prescribed by the Commissioner" there must be inserted the phrase "included in which shall be entered the name and address of the person or persons to whom distilled spirits were

sent.” Only the legislature has power to so amend a penal statute, as the authorities have long since made clear.

“Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for.” *U. S. v. Noveck*, 271 U.S. 201, 204; 46 S.Ct. 476, 477; 70 L.Ed. 904, 906.

“It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. ‘There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.’” *Todd v. U. S.*, 158 U.S. 278, 282; 15 S.Ct. 889, 890; 39 L.Ed. 982.

“To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those enumerated.” *U. S. v. Wiltberger*, 5 Wheat. 76, 95; 18 U.S. 76, 95; 5 L.Ed. 37.

“Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.” *U. S. v. Weitzel*, 246 U.S. 533, 543; 38 S. Ct. 381, 383; 62 L.Ed. 872, 875.

“Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used.”

\* \* \* Before one may be punished, it must appear



that his case is plainly within the statute; there are no constructive offenses." *U. S. v. Resnick*, 299 U.S. 207, 209; 57 S.Ct. 126, 127; 81 L.Ed. 127, 129.

*Fasulo v. U. S.*, 272 U.S. 620; 47 S.Ct. 200; 71 L.Ed. 443;

*U. S. v. Bathgate*, 246 U.S. 220; 38 S.Ct. 269; 62 L.Ed. 676.

**(b) Title 26 U.S.C.A. Section 2857 does not constitutionally empower or constitutionally delegate power to the Commissioner of Internal Revenue alone, or with the approval of the Secretary, to promulgate a regulation requiring the use of a form, or prescribe a form, wherein wholesale liquor dealers must by an entry indicate the name and address of the person or persons to whom distilled spirits were sent, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses, does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.**

(Specifications of Error I, II, III, IV, V)

Having shown that the offenses charged in the indictment are not found within the language or meaning of the terms employed by the statute, query whether the statute constitutionally empowered or delegated power to the Commissioner to prescribe a form or a regulation by means of which a wholesale liquor dealer is required under pain of punishment to make an entry in the "record of distilled spirits received and disposed of by him" indicating the name and address of the person or persons to whom distilled spirits were sent. We believe it clear

that the statute gives the Commissioner, alone or with the Secretary, no such power.

The statute after defining the record, i.e., "record of distilled spirits received and disposed of" provides as to the authority of the Commissioner as follows:

"That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe."

"Every \* \* \* wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, \* \* \* or makes any false entry therein, \* \* \* shall pay a penalty of \$100 and, on conviction, shall be fined not less than \$100 nor more than \$5,000, and be imprisoned not less than three months nor more than three years."

We are not here dealing with that type of statutory delegation of regulation making power, where an administrator is authorized in blanket fashion to issue regulations to carry out the purposes of an Act, and violation of his regulations are made crimes by the Act.\*

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\*For example such as the Act of 1897, c. 2, 30 Stat. 36, which provided that the Secretary "may make all such rules and regulations \* \* \* as will insure the objects of such reservation, namely, to regulate their occupancy and use and preserve the forest thereon from destruction, and any violation of the provisions of this Act or such rules and regulations of the Secretary shall be punished as prescribed in Section 5388 of the Revised Statutes as amended."

Nor is this a case where Congress in equally blanket fashion authorizes an administrator to issue regulations requiring such records or reports as the administrator may feel are necessary or proper, and establishes it as a crime the making of a false entry in any record or report required by the regulations.†

Under 26 U.S.C.A. 2857, the Commissioner is not empowered to require that a wholesale liquor dealer keep a record which the Commissioner for the time being happens to think would contain interesting information, although the contention of the prosecution comes down to just that.

The Commissioner has been delegated power only to prescribe where the "record of distilled spirits received and disposed of" shall be kept, and the *form* in which "such records" shall be kept; his authority extends to matters of form only, not to matters of content and substance. The statute itself descends to details and specifies all matters of content and substance. It prescribes when the record is to be made, i.e., "daily"; it prescribes what is to be in the "record," i.e., "distilled spirits received and disposed of"; it prescribes where the record is to be kept, being at the wholesaler's place of business, "provided, that the Commissioner may in his discretion require

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†For example such as 50 U.S.C.A., War Appendix Sections 921, 922, 925, where the OPA Administrator was given blanket authority by Section 921(d) to "from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act," and by Section 922(b) authorized "The Administrator \* \* \* by regulation or order to require any person who is engaged in the business of dealing with any commodity \* \* \* to make and keep records and other documents," and by Section 925(b) specified punishment for "any person who makes any statement or entry false in any material respect in any document or report required to be kept" under Section 922.

such record to be kept at the place where the spirits are actually received and sent out.”

However, the indictment contends that the Commissioner may add by regulation the requirement that “such record” must also contain an entry “indicating the name and address of the person or persons to whom distilled spirits were sent.” But the Commissioner may not, because the power conferred to make regulations must be exercised within the powers delegated. The requirements of the statute may not be extended, modified, amended or added to by regulation. *Campbell v. Galeno Chemical Co.*, 281 U.S. 599; 50 S.Ct. 412; 74 L.Ed. 1063; to the same effect: *Riverdale Co-Operative Creamery Assn. v. Commissioner of Internal Revenue* (C.C.A.9), 48 Fed. 2d 711, 714; *Kobilkin v. Pillsbury, et al.*, (C.C.A. 9) 103 Fed. 2d 667, 670. Here where the statute has defined the content of the record and thus specified the subject, i.e., “distilled spirits,” the Commissioner is precluded from extending it to other subjects, i.e., “names and addresses.” Cf. *Peoria & P. U. R. Co. v. U. S.*, 263 U.S. 528, 534-535; 44 S.Ct. 194, 196; 68 L.Ed. 427, 430; to the same effect: *U. S. v. Fruit Growers’ Express Co.*, 279 U.S. 363, 370; 49 S.Ct. 374, 377, 73 L.Ed. 739, 743. For, “where, as in this case, the provisions of the Act are unambiguous, and its directions specific, there is no power to amend it by regulation.” *Koshland v. Helvering*, 298 U.S. 441, 447; 56 S.Ct. 767, 770; 80 L.Ed. 1268, 1273.

It cannot be seriously argued that the sentence, “The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner \* \* \* may prescribe,” delegates to the Commissioner the authority to promulgate general regulations

by which he may require that a wholesaler keep a record of the names and addresses of the person or persons to whom distilled spirits were sent. Obviously, it does not. But for sake of argument, assume it does. Still that does not support the case for the prosecution because the statute has not made it an offense to violate regulations of the Commissioner, nor are penalties prescribed for such a violation.

In this respect, the case is clearly within the principle laid down in *U. S. v. Eaton*, 144 U.S. 677; 12 S.Ct. 764; 36 L.Ed. 591. In the *Eaton* case the prosecution relied upon Section 20 of the Act there in question, which empowered the Secretary to make "all needful \* \* \* regulations" for enforcing the Act. But the Act itself did not require an oleomargarine dealer, as it did a manufacturer, to "keep such books, render such returns \* \* \* as the Commissioner \* \* \* may, by regulation require." Nor did the statute prescribe a penalty for violation of a regulation of the Commissioner. Pursuant to the very broad authorizing language of Section 20, the Commissioner had promulgated a regulation requiring a dealer to "keep a book (form 61) and make a monthly return on form 217, showing the oleomargarine received by them, and from whom received; also the oleomargarine disposed of by them, and to whom sold or delivered." But the Supreme Court held that the failure of a dealer to do so did not constitute an offense because the Commissioner could not require more than the statute itself required.

The precise language of the statute at bar bears further study. The statute provides "every wholesale liquor dealer \* \* \* shall keep daily \* \* \* a record of distilled spirits received and disposed of by him, and shall render under

oath correct transcripts and summaries of *such records*” (emphasis added). Note that the statute has not only specified the contents of the records, but it has in the very same sentence defined the term “such records.” Note now the definition of the offense: “Every \* \* \* wholesale liquor dealer who refuses or neglects to keep *such records* in the *form prescribed* by the Commissioner \* \* \* or makes any false entry therein” (emphasis added). It is obvious that the offense proscribed is not that of making a false entry in a record, the contents of which are prescribed by the Commissioner, because in relation to the criminal sanctions, the statute has not even purported to give authority to the Commissioner to specify the contents of the record, but only the *form*, i.e., the physical arrangement of the contents which the statute itself has defined. The statute is utterly plain; it first specified exactly the content of the record, and then it defined exactly the term “such records.” Thus the penal provision by using the defined phrase “such records” refers back to the content of the record first specified, and hence the crime is making a false entry “of distilled spirits received and disposed of,” not making a false entry as to names and addresses of the person or persons to whom distilled spirits were sent, for the statute does not specify that “such record” shall contain anything but “daily \* \* \* distilled spirits received and disposed of.” The statute having specified the content of the record, the Commissioner is without power to add to it. *Williamson v. U. S.*, 207 U.S. 425; 28 S.Ct. 163; 52 L.Ed. 278; *Waite v. Macy*, 246 U.S. 606, 608-609; 38 S.Ct. 395, 396; 62 L.Ed. 892, 894; *Merritt v. Welsh*, 104 U.S. 694; 26 L.Ed. 896.

In principle, the question is identical to that in *Morrill, Collector, etc. v. Jones*, 106 U.S. 466, 1 S.Ct. 423, 27 L.Ed. 267, a case frequently and currently cited as fundamental authority. There the statute provided that "all animals alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty) upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe." Under this apparently very broad authority, the Secretary's regulation provided that before a Collector admitted such animals free he must, among other things, "be satisfied that the animals are of superior stock." The Collector demanded customs duties of Jones because he was not satisfied the animals were of "superior stock." The Supreme Court held the Secretary "cannot by his regulations alter or amend a revenue law," and that the regulation in question "was in excess of the power of the Secretary." If then in this civil case, the Secretary may not require proof beyond that designated by the statute, i.e., "specially imported for breeding purposes," *a fortiori* in the criminal case at bar, he may not require that the record contain information beyond that designated by the statute, i.e., "distilled spirits received and disposed of."

In the case at bar the offense is created by the regulation, not by the statute. Under the contention of the indictment, the statute is not the final arbiter as to which acts shall be criminal and which shall not. To the contrary the Commissioner is, for, under the theory of the indictment, he may at his pleasure by regulation expand and contract, modify and alter the content of the "record" and the entries which are to be made in "a record of distilled spirits received and disposed of," and which

entries, if false, constitute offenses. In this case, it is not the law, but the action of the Commissioner for the time being, which is final and decisive, even though the statute invoked does not delegate to the Commissioner plenary rule making power.

If the Commissioner may require that to the "record of distilled spirits received and disposed of" must be added an entry indicating "the name and address of the person or persons to whom distilled spirits were sent," query: May he not require that person's phone number, his home address, the address of his warehouse, his political affiliations, or, for that matter, his religion? And if not, why not? For once it is decided that "of distilled spirits received and disposed of" is not a specification of the contents of the "record" and is not a limitation upon the power of the Commissioner, and that, therefore, the Commissioner may require that to that "record" be added entries "indicating the name and address of the person or persons to whom distilled spirits were sent," then there is no limit to what the Commissioner may require in "a record of distilled spirits received and disposed of."

The vice of the statute exposed by the putting of these cases cannot be glossed over on the theory that the cases are imaginary but not probable because no reasonable Commissioner would require any such entries to be made in the "record," and therefore this power, claimed by the indictment, to say what the "record of distilled spirits received and disposed of" shall contain, would not be abused. To take that position is to ignore the condition and essence of the principles of law involved. The essence of the law in this respect is, not that such power will not be abused, but that no person shall be clothed with any



such power, under the color or pretext of which he is given the opportunity of thus establishing offenses without clear legislative basis.

That the Commissioner has no such power is clear. Under the statute his power is restricted to prescribing the *form* of the "record of distilled spirits received and disposed of" and where "such records" are to be kept. He has no power to prescribe the content of "such records" nor what entries "such record" shall contain. He is given no authority to add by regulation a requirement that "such record" shall also contain the "name and address of the person or persons to whom distilled spirits were sent." The record required by the statute is "of distilled spirits received and disposed of." The word "of" makes clear that in the record is to be entered "distilled spirits received and disposed of," and not a lot of names and addresses. Had names and addresses been wanted, the statute would have so provided, just as it did prior to the 1936 amendment when this very requirement was stricken out. The statute does not empower the Commissioner to create by regulation the offense of making a false entry as to the name and address of the person to whom distilled spirits were sent. Under the statute there is no such offense, and the statute does not delegate to the Commissioner the authority to create such an offense by regulation.

To require that "such records" contain the name and address of the person or persons to whom distilled spirits were sent, is to add to and enlarge the statute. Under the construction contended for by the indictment, the Commissioner would have power to enlarge the statute at

will. Such power is not regulation; it is legislation and the Commissioner is forbidden to legislate.

*U. S. v. United Verde Copper Co.*, 196 U.S. 207, 215;  
25 S.Ct. 222, 225; 49 L.Ed. 449, 452;

*U. S. v. George*, 228 U.S. 14; 33 S.Ct. 412; 57 L.Ed. 712;

*Lynch v. Tilden Produce Co.*, 265 U.S. 315, 44 S.Ct. 488; 68 L.Ed. 1034;

*M. Kraus & Bros. v. U. S.*, 327 U.S. 614, 66 S.Ct. 705; 90 L.Ed. 894.

**(c) The regulations promulgated by the Commissioner of Internal Revenue, Sections 194.75 to 194.81 inclusive of Title 26, Code of Federal Regulations pursuant to Title 26 U.S.C.A. Section 2857, do not require that a wholesale liquor dealer make an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses, does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.**

(Specifications of Error I, II, III, IV, V.)

It is the contention of the prosecution that pursuant to 26 U.S.C.A. Section 2857, the Commissioner promulgated the regulations of Sections 194.75 to 194.81 inclusive of Title 26 of Code of Federal Regulations, and that thereby the appellants, as wholesale liquor dealers, were required to make an entry in "a record of distilled spirits received and disposed of" indicating the name and address of the person or persons to whom distilled spirits were sent, and,

accordingly, making a false entry of such name and address constitutes an offense against the United States under 26 U.S.C.A. Section 2857.

These regulations, Sections 194.75 to 194.81, Title 26 Code of Federal Regulations, were specified and identified at the trial as the ones which promulgated and prescribed Form 52-B, and which required the use of Form 52-B by wholesale liquor dealers (117-120) and, as such, were introduced in evidence (137). The regulations at the end of each specifically set forth that the statutory authority for their promulgation is 26 U.S.C.A. 2857 (Appendix E). Government's Exhibit 15 in evidence (109) contains the headings that were on each respective Form 52-B in evidence (137-138), which Forms 52-B were admitted in evidence over appellants' continuing objection (121-132, 132). It was upon these regulations that Forms 52-B became the documentary predicate for both the offenses charged in the indictment (2-3) and the proof of the false making of entries indicating the name and address of the person to whom distilled spirits were sent (121-132). These regulations are set out in full in Appendix D.

The pertinent parts of the regulations are as follows:

“194.75. Records to be kept by wholesale liquor dealers. (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, ‘Wholesale Liquor Dealer’s Record,’ and render monthly transcripts, Forms 52A and 52B, ‘Wholesale Liquor Dealer’s Monthly Report,’ and Form 338, ‘Wholesale Liquor Dealer’s Monthly Report (Summary of Forms 52A and 52B).’

“(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indi-

cated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur:”

As previously shown, nowhere in 26 U.S.C.A. Section 2857 is it required that “a record of distilled spirits received and disposed of” contain any entry indicating the name and address of the person to whom distilled spirits were sent. The regulations are equally silent; they do not prescribe or require that in Form 52-B an entry be made of the name and address of the person to whom distilled spirits were sent. The regulations merely say, “Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings on the various columns, and in accordance with the instructions printed thereon. \* \* \*” Nowhere in the regulations is Form 52-B or the form of Form 52-B prescribed; nowhere in the regulations are the headings prescribed.

There is no legal basis for the offenses charged, either in the statute, or in the regulation, for in neither case is an entry prescribed and required “indicating the name and address of the person or persons to whom distilled spirits were sent.” No case has been found where criminal liability is made to depend, not upon statute, not upon a regulation having clear legislative basis, but upon unspecified headings on a form which itself is unprescribed but only referred to by the regulations relied upon to support the charge of the commission of offenses. Printed headings on a form, additional to the expressed items of the regulation do not have the force of law. *U. S. v. Lamson*, 162 Fed. 165, 168.

Comparative inspection of Rev. Stat. 3318 before amendment, and Title 26, U.S.C.A. Section 2857 as it was after amendment, and Form 52-B is revealing.

Columnar Entries Specified by Rev. Stat. 3318 prior to 1936 Amendment. (Appendix B)	Columnar Headings on Form 52-B (Gov. Exhibit 15, T.R. 109)	Entries Specified by Rev. Stat. 3318 Subsequent to 1936 Amendment (Appendix C), and as continued in Title 26 U.S.C.A. Section 2857 (Appendix A)
"The day when"	Date Removed	"daily"
"the name and place of business of the person or firm to whom such spirits are to be sent"	To Whom Sent Name Address	
"if in the original packages in which they were received, the name of the distiller"	By Whom Distilled, Rectified, or Bottled (Shown on case) Name Registry or Permit No.	
"the quantity * * * of such spirits"	State or Country	
"kind or quality of such spirits"	Number of Cases	"distilled spirits * * * disposed of"
"the number of gallons and fractions of a gallon at proof"	Quantity of Spirits Whiskey (Wine Gallons) Gin (Wine Gallons) Brandy (Wine Gallons) Other Distilled Spirits Kind (Wine Gallons)	
"if in the original packages in which they were received * * * the serial number of the package"	Inclusive Serial Nos. of cases	

It is thus obvious that the Treasury Department officials are attempting to write back into the statute all that which the Congress has by positive act stricken out, and purport to do so by the extra legal and vague device of promulgating a regulation requiring wholesalers to make "daily entries \* \* \* on Record 52 \* \* \* as indicated by the headings on the various columns." Thereby the posi-

tive action of the Congress is circumvented. By this means offenses are attempted to be created.

The vice of the matter is thrown in sharp relief when the statute and regulations in the case at bar are compared to the oleomargarine acts and regulations, where it is apparent that names and addresses were wanted. Section 5 of the Act of August 2, 1886, 24 Stat. 210, Title 26 U.S.C.A. Section 2302 (c) in pertinent part provides:

“Every manufacturer of oleomargarine \* \* \* shall keep such books, and render such returns of materials and products, \* \* \* as the Commissioner, with the approval of the Secretary, may, by regulation, require.”

Pursuant thereto, the Commissioner prescribed in Section 310.24, Title 26, Code of Federal Regulations, as follows:

“310.24. Records (a) Manner of keeping \* \* \*.

“(b) Items. The record must show \* \* \*.

“(3) The number of pounds in each lot disposed of, the name of the consignee, the address to which delivered, and the date of the shipment.”

Section 6 of the Act of August 2, 1902, 32 Stat. 197, Title 26 U.S.C.A. Section 2303(c), in pertinent part provides:

“Wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the Commissioner, with the approval of the Secretary, may, by regulation require;”

Pursuant thereto, the Commissioner prescribed in Section 310.42, Title 26, Code of Federal Regulations, as follows:

“310.42 Records—(a) Manner of keeping \* \* \*.

“(b) Items. The record must show:

“(1) The number of pounds in each consignment of oleomargarine received, the name and address of the consignor, and the date of receipt.

“(2) The number of pounds in each lot disposed of, the name of the consignee, the address to which delivered, and the date of shipment.”

The old regulations under the Act of August 2, 1902, *supra*, as cited in *U. S. v. Lamson* (1908), 165 Fed. 80, 81, provided:

“Wholesale dealers in oleomargarine will make monthly returns on form 217 (with inside sheets when needed to complete detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received from the manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned \* \* \*.”

When these provisions are compared to those at bar, the complete failure of the statute at bar to clothe the Commissioner with authority to do that which he has here attempted, is exposed. Unlike the oleomargarine statutes, *supra*, the statute at bar does not clothe the Commissioner with plenary power to command the keeping of such books and returns as the Commissioner for the time being may require. Comparative inspection makes also obvious the fatal omission of the regulations at bar to command that a wholesale liquor dealer make an entry “indicating the name and address of the person or persons to whom distilled spirits were sent.” Unlike the oleomargarine regulations, *supra*, the regulations at bar do not command that the record contain names and addresses.

Moreover, the oleomargarine regulations, *supra*, make it rather clear that in order to legally require the keeping of a record of "the name and address of the person or persons to whom distilled spirits were sent," the legal command to do so must be just that and in so many words. Such a command is not to be implied from the command that there be kept "a record of distilled spirits \* \* \* disposed of."

The law is clear; it is not an offense under Title 26 U.S.C.A. Section 2857 to falsely make an entry as to the name and address of the person to whom distilled spirits were sent. Nor does this regulation create such an offense, nor can it legally.

Decisive is *Viereck v. U. S.*, 318 U.S. 236; 63 S.Ct. 561, 562; 87 L.Ed. 734. There the prosecution contended, as the indictment here contends, that the Secretary had been empowered under the Act there in question, to prescribe a form, and to promulgate all "necessary" regulations. There, as here, it was contended that the Secretary by prescribing a form, thereby in legal effect lawfully prescribed and required the entry of such details as by the heading on the form were demanded to be stated. There, as here, it was contended that, under the authority of the Act which required "such details required under this Act as the Secretary shall fix, of the activities of such persons as agent of a foreign principal" and under his authority "to prescribe such rules, regulations and forms as may be necessary to carry out this Act," that the Secretary's requirement that the person give a "comprehensive statement of nature of business of registrant"



was such as to make a failure of a registrant to state the various activities he was engaged in an offense under the Act which prescribed omission to state a material fact required to be stated. And there, as ought be the case here, the court held the Act did not command, or authorize the Secretary to command, registrants to make any mention or supply any details beyond those specified by the Act. The Supreme Court squarely held that the command of the statute requiring a registrant to file "details \* \* \* of the activities of such person as agent of a foreign principal" could not be expanded by a form or regulation of the Secretary so as to require inclusion of details of activities other than as such agent. The Secretary had by prescribing a form and regulation asked more than the statute demanded, and the conviction for omitting to provide it was reversed.

In the case at bar where the statute prescribes "a record of distilled spirits received and disposed of," just as held in the *Viereck case*, that is at once a designation of the contents of the record and a limitation on the power of the Commissioner. In the words of the *Viereck case* that limitation cannot "be disregarded in determining what statement the statute, and any regulation which it authorizes the Secretary to promulgate, called on petitioners to make." Here, as there, the Commissioner cannot override the statute by prescribing forms or regulations requiring more or different entries than the statute itself requires.

In the *Viereck decision*, the Supreme Court reaffirmed the principles of law decisive to the case at bar, viz.:

“One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress.” (citing cases) (318 U.S. 241-242) “Unless the statute fairly read, demands the disclosure of the information \* \* \* he cannot be subjected to the statutory penalties.” (318 U.S. 242)

“The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem.” (318 U.S. 243)

“Even though \* \* \* due to defective draftsmanship or to inadvertance, \* \* \* men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law.” (318 U.S. 245).

The principles have long since been the law of the land.

*U. S. v. Eaton*, 144 U.S. 677, 12 S.Ct. 764, 36 L.Ed. 591;

*Todd v. U. S.*, 158 U.S. 278, 15 S.Ct. 889, 39 L.Ed. 982;

*U. S. v. Wiltberger*, 5 Wheat. 76, 18 S.Ct. 76, 5 L.Ed. 37;

*U. S. v. Harris*, 177 U.S. 305, 20 S.Ct. 609, 44 L.Ed. 780;

*U. S. v. United Verde Copper Co.*, 196 U.S. 207,  
25 S.Ct. 222, 49 L.Ed. 449;

*U. S. v. George*, 228 U.S. 14, 33 S.Ct. 412, 57 L.Ed.  
712;

*Lynch v. Tilden Produce Company*, 265 U.S. 315,  
44 S.Ct. 488, 68 L.Ed. 1034;

*U. S. v. Resnick*, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed.  
127;

*M. Kraus & Bros. v. U. S.*, 327 U.S. 614, 66 S.Ct.  
705, 90 L.Ed. 894.

By the regulation the Commissioner has not in fact prescribed that a wholesale liquor dealer must make an entry of "the name and address of the person or persons to whom distilled spirits were sent." Furthermore, under statute, on the authorities cited, he is without power to do so, so as to thereby establish as an offense the false making of such an entry, for the regulations of the Commissioner "cannot enlarge the meaning of a statute enacted by Congress," nor "add to the terms of an Act of Congress and make conduct criminal which such laws leave untouched." *U. S. v. Standard Brewery*, 251 U.S. 210, 220, 40 S.Ct. 139, 141, 64 L.Ed. 229, 235.

**(d) That portion of Title 26 U.S.C.A. Section 2857 upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.**

(Specifications of Error I, II, III, IV, V)

As shown the statute does not require that a wholesaler keep a record or make an entry of the "name and

address of the person or persons to whom distilled spirits were sent." In this regard the contention of the indictment is baldly and simply this: The statute by specifying as an offense the case where a wholesaler "makes any false entry \* \* \* in \* \* \* a record of distilled spirits received and disposed of by him," thereby defines as an offense the case where a wholesaler makes any false entry in a record of the name and address of the person or persons to whom distilled spirits were sent, because the words "a record of distilled spirits received and disposed of" includes (as the indictment puts it "among other things") "the name and address of the person or persons to whom distilled spirits were sent."

The basis of such a contention necessarily is: the words "a record of distilled spirits received and disposed of" do not define the contents of such "a record"; the words "distilled spirits received and disposed of" are not a definite limitation upon the term "a record"; and the content of the "record" is not what the statute specified it to be, but is whatever administrators, juries and courts may from time to time guess it ought contain. Once we cast off the plain restriction of the phrase "distilled spirits received and disposed of," the term "a record" is then adrift in a sea of uncertainty and vagueness.

Once the principle contended for by the indictment is accepted, then it follows that a Commissioner may require that the "record" include the customer's description, his fingerprints, his financial statement, and so *ad infinitum*, for such matters do not differ in principle or logic with "the name and address of the person or persons to whom distilled spirits were sent." Accordingly, then, a whole-

saler who fails to submit such data or who "makes a false entry" of such data in the "record of distilled spirits received and disposed of" has thereby committed an offense.

Under the construction of the statute contended for by the indictment, the test of criminality would not be dependent upon a fixed objective standard set out in the statute, but rather would depend upon the subjective and shifting criteria of administrative and prosecuting officials.

If the statute is susceptible of such a construction, then the statute is unconstitutional and void because it is vague and uncertain and indefinite and sets up no immutable standard of guilt. It fails to have the definiteness and certainty essential to a valid penal statute.

*U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516;

*Connally, Commissioner, et al. v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

**(e) That portion of the regulations of the Commissioner, Sections 194.75 to 194.81 inclusive of Title 26 Code of Federal Regulations, upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.**

(Specifications of Error I, II, III, IV, V.)

As shown the statute does not require that a wholesale liquor dealer keep a record or make an entry of the "name and address of the person or persons to whom distilled spirits were sent"; nor do the regulations specify or prescribe it. The false making of such an entry is not an offense.

In this regard the regulations merely state: "daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with instructions printed thereon." On its face the regulation provides no fixed objective standard ascertainable from the regulation, but rather makes unspecified headings of an unprescribed form and unspecified "instructions printed thereon" the basis for the offense of falsely making an entry of the name and address of the person or persons to whom distilled spirits were sent. The regulation is not only vague and uncertain, but it contains no immutable standard at all.

Nowhere in the statute or regulations can a user find what is to be contained in Form 52-B, even though by Section 194.81 of the regulations a user is to provide Form 52-B at his own expense.

Nowhere in the statute or regulations can one look to see whether "Charles R. Hadley Co., Pathfinders," the printer of Form 52-B (109), had in fact accurately reproduced Form 52-B and the "headings" thereon "in the form prescribed by the Commissioner." It will take a better pathfinder than counsel for appellants to locate in the statute or regulations any such prescription.

Under the regulation the "headings" and "instructions" could be changed, altered or enlarged a hundred times by a dozen departmental employees, and one would read the statute and the regulation in vain to ascertain what the new requirements are, what entries one must make, and what acts are proscribed.

Manifestly the regulation is void for uncertainty.

*U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516;

*Connally, Commissioner, et al. v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

### CONCLUSION

In determining whether or not an indictment states a public offense "doubt must be resolved in favor of the accused." *Williamson v. U. S.*, supra, 28 S.Ct. 163, 165. "In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the accused." *Harrison v. Vose*, supra, 9 Howard, 372, 378.

For the reasons, and upon the authorities hereinbefore cited, the judgments of conviction as to each of the appellants should be reversed and the indictment dismissed.

Respectfully submitted,

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*Attorney for Appellants, James W. Hensley, United Sales Company, a corporation, and United Distributors, Inc., a corporation.*

**(Appendices follow)**





## Appendix A

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### THE PRESENT STATUTE

Title 26, Section 2857, U.S.C.

“2857. Books of rectifiers and wholesale dealers.

“(a) Requirements. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided*, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

“The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

“Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records,

or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of \$100 and, on conviction, shall be fined not less than \$100 nor more than \$5,000, and be imprisoned not less than three months nor more than three years.

“Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than \$100 for each such neglect or refusal.”

**Appendix B**

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**THE STATUTE PRIOR TO AMENDMENT IN 1936**

R. S. Sec. 3318, as amended, as in force prior to 1936 Amendment, United States Code, 1934 Edition, Sections 1208 and 1209, Title 26.

“1208. Books of rectifiers and wholesale dealers. Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alter the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified, or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like manner in said book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and fractions of a gallon at proof, and, if in the original package in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises

of such rectifier or wholesale dealer for inspection, and any revenue officer or internal revenue agent may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor dealer for a period not less than two years; and during such time it shall be produced by him to every revenue officer or internal revenue agent demanding it. And whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book, or to make entries therein as aforesaid, or cancels, alters, obliterates, or destroys any part of such book, or any entry therein, or makes any false entry therein, or hinders or obstructs any revenue officer or internal revenue agent from examining such book, or making any entry therein, or taking any abstract therefrom; or whenever such book is not preserved or is not produced by any rectifier or wholesale liquor dealer as hereinbefore directed, he shall pay a penalty of \$100 and shall on conviction be fined not less than \$100 nor more than \$5,000, and imprisoned not less than three months nor more than three years (R. S. Sec. 3152; R. S. 3318; Feb. 27, 1877, c. 69, 19 Stat. 248; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 329).

“1209. Monthly transcripts of books of rectifiers and wholesale dealers. Every person required to keep the books prescribed by section 1208 shall, on or before the 10th day of each month, make a full and complete transcript of all entries made in such book during the month preceding, and, after verifying the same by oath, shall forward the same to the collector of the district in which he resides. Any failure by reason of refusal or neglect to make said transcripts shall subject the person so offending to a fine of \$100 for each neglect or refusal (R. S. Sec. 3318; Mar. 1, 1879, c. 125, Sec. 5, 20 Stat. 339).”

## Appendix C

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### THE STATUTE AS AMENDED IN 1936

Act of June 26, 1936, Chapter 830, Title IV, Section 411, 49 Stat. 1962-1963.

“Sec. 411. Section 3318 of the Revised Statutes, as amended (U.S.C., 1934 ed., title 26, secs. 1208 and 1209), is further amended to read as follows:

‘Sec. 3318. Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided*, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

‘The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

‘Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, or to make entries therein, or cancels, alters, or obliterates any entry

therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this Act or by regulations issued pursuant thereto, shall pay a penalty of \$100 and, on conviction, shall be fined not less than \$100 nor more than \$5,000, and be imprisoned not less than three months nor more than three years.

‘Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than \$100 for each such neglect or refusal.’ ”

**Appendix D**

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**THE ORIGINAL STATUTE**

Act of July 20, 1868, Chapter 186, Sec. 45, 15 Stat. 143.

“Sec. 45. *And be it further enacted*, That every rectifier, wholesale liquor dealer, and compounder of liquors shall provide himself with a book, to be prepared and kept in such form as shall be prescribed by the commissioner of internal revenue, and shall, on the same day on which he receives any spirits, and before he shall draw off any part thereof, or add water or anything thereto, or in any respect alter the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified, or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon; and every such rectifier, compounder, and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same shall be removed from his premises, enter, in like manner, in the said book, the day when, and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and the kind or quality of such spirits, and also the number of gallons and fractions of a gallon at proof; and, if in the original packages in which they were received, he shall enter the name of the distiller and the serial number of the package. And every such book shall be at all times kept in some public or open place on the premises of such rectifier, wholesale dealer,

or compounder of liquors, respectively, for inspection; and any revenue officer may make an examination of such book and take an abstract therefrom; and every such book, when it has been filled up as aforesaid, shall be preserved by such rectifier, wholesale liquor dealer, or compounder of liquors, for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding the same; and if any rectifier, wholesale dealer, or compounder of liquors shall refuse or neglect to provide such book or to make entries therein as aforesaid, or shall cancel, alter, obliterate, or destroy any part of such book, or any entry therein, or make any false entry therein, or hinder or obstruct any revenue officer from examining such book or making any entry therein, or taking any abstract therefrom; or if such book shall not be preserved or not produced by any rectifier, or wholesale dealer, or compounder, as hereinbefore directed, he shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."



**Appendix E**

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**THE REGULATIONS**

Section 194.75 to 194.81 inclusive, Title 26 Code of Federal Regulations; Supplement 1940, Titles 21-29, Book 2, Code of Federal Regulations of the United States of America, pages 3001-3003.

“194.75 *Records to be kept by wholesale liquor dealers.*

(a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, ‘Wholesale Liquor Dealer’s Record,’ and render monthly transcripts, Forms 52A and 52B, ‘Wholesale Liquor Dealer’s Monthly Report,’ and Form 338, ‘Wholesale Liquor Dealer’s Monthly Report (Summary of Forms 52A and 52B).’

“(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur: *Provided*, That if the keeping of such separate record is approved by the district supervisor, a wholesale liquor dealer may keep a separate record, such as invoices, of the removal of distilled spirits, showing the removal data required to be entered on Record 52, but the daily entries of the removal of distilled spirits from his premises shall be made on Record 52 not later than the close of business of the following business day.

“(c) A dealer who sells wines or malt liquors, or both, in wholesale quantities, and who sells distilled spirits in retail quantities, is not required to keep Record 52 or to

file monthly transcripts, Forms 52A and 52B, and report, Form 338.

“(d) Wholesale liquor dealers who sell wines and malt liquors only, and wholesale malt liquor dealers are not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338† (I.R.C. 2857, 2858, 53 Stat. 327, 328; 26 U.S.C., Sup., 2857, 2858).

“194.76. *Separate record of serial numbers of cases.* Serial numbers of cases of distilled spirits disposed of need not be entered on Record 52, provided the proprietor keeps at his place of business a separate record, showing such serial numbers, with necessary identifying data, including the date of removal and the name and address of the consignee, provided the keeping of such record is approved by the district supervisor. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such manner that the required information may be ascertained readily therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by revenue officers. If a record in book form is kept, entries shall be made on such separate approved record not later than the close of business of the day on which the transactions occur. The dealer shall note in Record 52, in the column for reporting serial numbers of spirits disposed of, ‘Serial numbers shown on commercial records per authority, dated .....† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857).

“194.77. *Entry of miscellaneous items.* Wholesale liquor dealers may enter on Record 52 as one item the total

quantity of different kinds of spirits made up from broken cases sold to the same person on the same day, provided such total quantity is not in excess of 10 gallons. The entry of such items shall be stated as 'Miscellaneous' or 'Misc.' and shall show the date, the name and address of the person to whom sold, and the quantity. The total quantity of such miscellaneous spirits so disposed of during the month shall be reported in the monthly summary, Form 338, as 'Miscellaneous': *Provided*, That the wholesale liquor dealer determines by actual inventory the quantity of each kind of spirits remaining on hand at the end of the month.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

“194.78. *Place where Record 52 shall be kept.* (a) Except as provided in paragraph (b), the wholesale liquor dealer shall keep Record 52 at the place of business covered by his wholesale liquor dealer special tax stamp, if spirits are received and sent out from such premises.

“(b) If the place of business covered by the wholesale liquor dealer special tax stamp is not the same premises where the spirits are received and sent out, the wholesale liquor dealer shall keep his Record 52 at the latter place and render transcripts from such place on Forms 52A and 52B and summary report on Form 338: *Provided*, That, if approved by the district supervisor, a wholesale liquor dealer may keep his Record 52 at the place of business covered by the special tax stamp and render transcripts on Forms 52A and 52B and summary report on Form 338 from such place. If, however, the place of business covered by the special tax stamp is not in the same supervisory district as the place where the spirits are received and sent out, Record 52 must be kept at the latter place and transcripts on Forms 52A and 52B and

summary report on Form 338 rendered to the district supervisor of that district.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857).

“194.79. *Wholesale liquor dealer maintaining a retail department.* (a) A wholesale liquor dealer who sells distilled spirits at wholesale and at the same premises sells distilled spirits at retail in his capacity as a retail dealer in liquors, and who maintains a separate retail department, shall keep Record 52 at his wholesale department of all distilled spirits ‘there received and disposed of. Distilled spirits transferred from the wholesale department to the retail department shall be reported on Record 52, part 2, as ‘Transferred to Retail Department.’ Where it is necessary in the filling of a wholesale order to take liquor out of the retail department, the quantity removed from the retail department must be shown on Record 52, part 1, as ‘Transferred from Retail Department,’ and the entire sale shown in Record 52, part 2, as a disposal.

“(b) The retail department need not be maintained in a separate room or be partitioned off from the wholesale department, but the retail department must in fact be separate from the wholesale department.

“(c) Where a wholesale liquor dealer sells at both wholesale and retail, and does not maintain a separate retail department, all distilled spirits received and disposed of shall be entered on Record 52.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

“194.80. *Monthly reports.* (a) A wholesale liquor dealer shall file transcripts of Record 52 on Forms 52A and 52B, and a summary report on Form 338, with the district supervisor, on or before the tenth day of the succeeding month. Record 52 shall be preserved for a period of 4 years and, during such period shall be available

during business hours for inspection and the taking of abstracts therefrom by any internal revenue officer.

“(b) If there be no receipts and disposals of distilled spirits by a wholesale liquor dealer, during any month, it will be necessary to forward monthly summary on Form 338 only to the district supervisor, showing the quantity on hand the first day of the month and the quantity on hand the last day of the month and marked ‘No transactions during month.’

“When a wholesale liquor dealer discontinues business as such, he shall render monthly reports, Forms 52A and 52B and the summary report on Form 338, covering transactions for the month in which business is discontinued, and mark such reports ‘Final.’ Record 52 shall be preserved by the dealer for a period of 4 years thereafter.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

“194.81. *Forms to be provided by users at own expense.* Record 52, Forms 52A, 52B, and 338 will be provided by users at their own expense, but must be in the form prescribed by the Commissioner: *Provided, That,* with the approval of the Commissioner, they may be modified to adapt their use to tabulating or other mechanical equipment: *Provided further,* That where the form is printed in book form, including loose-leaf books, the instructions may be printed on the cover or the fly leaf of the book instead of on the individual form.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

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†“For source citation, see note to Sec. 194.1.” The note to Section 194.1 is as follows: “The source of Secs. 194.1 to 194.96, inclusive, is Regulation 20, Secretary of the Treasury, June 6, 1940, effective on and after the sixtieth day; 5 FR 2170.” (Page 2986, Supplement 1940, Titles 21-29, Book 2, Code of Federal Regulations of the United States of America.)

